Supreme Court, U.S.
FILED
AUG 18 2006
OFFICE OF THE CLERK

No. 05-1447

In The
Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC., *Appellant,*
v.
FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

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August 2006

Corporate Disclosure Statement

The Christian Civic League of Maine, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

Just as Defendants argued in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*"), that this Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), precluded all as-applied challenges to the electioneering communication prohibition, Defendants now argue that *McConnell* precludes all preliminary injunctions in as-applied challenges to the prohibition. And the district court's analysis, if allowed to stand, would make it impossible to obtain injunctions whenever First Amendment liberties are deprived (not only in as-applied challenges to the electioneering communication prohibition).[1]

Whether preliminary injunctions are permitted is a substantial question of great public importance because preliminary injunctions are essential to protect First Amendment liberty, and in many cases (such as the present one) a denial of a preliminary injunction determines whether the ability to speak at a crucial moment will be forever lost. The fact that a preliminary injunction was denied does not make this case less worthy of review. Rather, this case is important precisely because it does involve a preliminary injunction.[2]

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[1]This Court is the only one with an opportunity to review the district court's analysis. 28 U.S.C. § 1253. Until January 1, 2007, the D.C. District is the only one that may hear challenges to the electioneering communication prohibition. 116 Stat. 114 (BCRA § 403(a)(1) and (d)(1)). It should be noted that other circuits employ a different preliminary injunction analysis than used here. *See, e.g., Roe v. Anderson,* 134 F.3d 1400, 1402 (9th Cir. 1998) (sliding scale).

[2]This case also provides a varied fact pattern from *WRTL*, 126 S. Ct. 1016, which this Court remanded with instructions for the district court to decide on the merits whether an exception is constitutionally required for genuine grassroots lobbying. Briefing on cross motions for summary judgment in *WRTL* was completed on August 18 and the case should be decided shortly. It is highly likely that *WRTL* will soon be before this Court, and by considering the cases together the Court can also consider the added

I. Preliminary Injunctions Are Necessary.

The federal rules provide for preliminary injunctions for a good reason, which is not always to preserve the status quo. Fed. R. Civ. P. 65. Preliminary injunctions are often essential to protect legal rights. Where there is a dispute over ownership of an historic building that is about to be demolished, a preliminary injunction is vital to preserve the status quo until ownership can be established. If the ultimately proven owner wanted the building preserved, her legal victory would be hollow if during litigation the building was demolished.

Where a law abridging First Amendment rights of free expression and petition is involved, there is also a valuable thing that can be destroyed during litigation, namely a timely moment to speak and petition. Where citizens participate in self-government by petitioning their representatives on imminent legislative or executive branch matters, the time before the pending action is crucial. If the people's rights are abridged at that crucial time, the opportunity is forever lost. The preliminary injunction decision effectively decides the whole case. In such situations, preliminary injunctions cannot merely preserve the status quo (understood here to mean that the law is given effect) because doing so would render the constitutional guarantees a nullity. Rather, preliminary injunctions must be available to protect the prior status quo, i.e., the situation before the law was enacted and only the First Amendment was in effect ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the Government . . . .").

Preliminary injunctions have been used in election law cases to preserve the people's rights. For example, in *Faucher v. FEC*, 743. F. Supp. 64 (D. Me. 1990), *aff'd*, 928 F.2d 468

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facts of the present case, e.g., the candidate named in the communications was unopposed, the League had no PAC, etc.

(1st Cir. 1991), *cert. denied*, 502 U.S. 820 (1991), the district court set a hearing on the motion for preliminary injunction, and at that time consolidated the preliminary injunction hearing with the hearing on the merits, deciding that the FEC's regulations that restricted Maine Right to Life's ability to publish voter guides were unconstitutional. Had the Defendants' present status-quo-governs argument prevailed, the people's liberty would have been violated.[3]

II. Preliminary Injunctions Are Not Precluded.

Defendants and the district court believe that *McConnell* precludes preliminary injunctions by eliminating irreparable harm because the PAC option is always available (as are use of alternative media etc.). FEC Motion at 22-23. This is simply a

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[3]The Defendants not only try to eliminate preliminary injunctions. They try to eliminate preenforcement challenges, implying that the League should simply have violated the law in order to maintain its claim. FEC Motion at 14-15 ("chose not to run the . . . advertisement"). But Defendants ignore the controlling fact that we deal here with the First Amendment, and this Court has never allowed the people's vital expression and petition rights to be so trampled upon."When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)) (cases collected). *See also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69-71(1993); *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581-82 (1985); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). *Cf. San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814 (9th Cir. 1987) (en banc) ("This is especially true in a First Amendment case because of 'the sensitive nature of constitutionally protected expression.'" *Id.* (quoting *Dombrowski v. Pfister*, 380 U.S. 479 (1965)); *Arkansas Right to Life PAC v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996).

reassertion, in new costume, of the argument that the same alternative options precluded as-applied challenges, which argument this Court unanimously rejected in *WRTL*, 126 S. Ct. 1016. But unless corrected, the district court's holding would mean that no plaintiff could ever obtain a preliminary injunction in an as-applied challenge to the electioneering communication prohibition because there could never be any irreparable harm.

The same is true as to the district court's holdings that the FEC would be harmed because it could not enforce the electioneering communication and that the public would be harmed because the law would not be enforced. Where do constitutional guarantees of liberty fit into such an analysis? Any time a free speech abridgment is challenged on constitutional grounds and a preliminary injunction is sought, the injunction will have the effect of stopping the FEC from enforcing the law and there will be a public law not being enforced. So obtaining a preliminary injunction is precluded under such broad rationales. And these broad rationales reach beyond the context of as-applied challenges to the electioneering communication prohibition. They would preclude constitutional challenges to any law enforced by any governmental authority.[4]

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[4]As to the likelihood of success on the merits, the district court also abused its discretion by relying on rationales already asserted as precluding as-applied challenges and rejected by this Court in *WRTL*, 126 S. Ct. 1016, e.g., the need for a prophylactic bright line, the availability of the PAC option (and other options), and some possible minimal effects on elections from genuine grassroots lobbying. (The effects on the election that the district court suggested might result from the Crossroads ad were particularly minimal – at a level that should not be cognizable in constitutional review.) The district court ignored its own *McConnell* record as to the existence of "genuine issue ads," which this Court recognized as a distinguishable, presumably protected category. *McConnell*, 540 U.S. at 206 n.88. Defendants rely on a presumption that an act of Congress is constitutional, which has no place where First Amendment rights are abridged. *American Library Ass'n v. Reno*, 308 U.S. App. D.C. 233 (D.C. Cir. 1994) ("'Content-based

This Court is the only court that will have the opportunity for appellate review of these serious analytical errors of the district court. Unless this Court corrects the error, preliminary injunctions are precluded in this district court.

III. The Mootness Exception Is Not Precluded.

Defendants and the district court are even trying to preclude the exception to the mootness doctrine for matters that are capable of repetition yet evade review. Election cases are classic examples of this exception to the mootness doctrine.[5]

Yet the lower court expressed concern that "the 'Crossroads' advertisement portion of the case," specifically, does not qualify under the "capable of repetition yet evading review" exception to mootness because that ad is not capable of repetition. June 23, 2006 Order at 1. But what must be "capable of repetition" to fit within the exception to mootness is not the running of the Crossroads ad itself: "the capable-of-repetition doctrine applies . . . only where the named plaintiff can make a reasonable showing that he will again be *subjected to the alleged illegality*." *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (emphasis added). It is the alleged illegality or injury that must be capable of repetition, not the specific scenario giving rise to the complaint.

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regulations are presumptively invalid.'" (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992))). Strict scrutiny is the antithesis of a presumption of constitutionality.

[5]*See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

A classic example is found in *Roe v. Wade*. 410 U.S. 113 (1973). The claims of Jane Roe and the class she represented would have been moot if the particular pregnancy she experienced when filing her claim in March 1970 had to be "capable of repetition." Indeed, the state made exactly this argument, pointing out that "she and all other members of her class are no longer subject to any 1970 pregnancy." 410 U.S. at 125. But it was not the specific pregnancies giving rise to the suit that met the requirements of the mootness exception. The claims were not moot because the restrictions remained in force and "[p]regnancy often comes more than once to the same woman," *id.* at 125, so it was reasonably likely that Roe would again be subjected to the challenged restrictions.

Likewise, the League need not show that the Crossroads ad itself is capable of repetition. It only needs to show a reasonable likelihood that it would again be subjected to the electioneering communication prohibition.[6] So when the League says that it wants to run materially similar ads in the future and shows that there is a reasonable likelihood of the ads coinciding with a prohibition period, it has met its burden of showing the

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[6]While the June, 2006 Senate vote on the Marriage Protection Amendment (S.J. Res. 1) is past, the League intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. VC ¶ 16. In addition to ongoing debate over a federal amendment protecting traditional marriage, the League has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including partial-birth abortion, permissive abortion, abortion clinic regulations, parental control of their children's education, regulation of sexual predators, legislation normalizing same sex relations, gambling, limiting the government's power to raise taxes and the freedom to advance its issues in the public forum. *Id.* This list provides sufficient notice of the subject matter of future materially-similar ads, and the abundance of these issues increases the likelihood that the League will again be forced to withdraw an ad that it would otherwise broadcast.

"capable of repetition" prong of the exception.[7] The issue is not whether planned future ads are ripe for review because the plan for future ads goes to the question whether there is a reasonable likelihood that the situation is "capable of repetition."

Defendants try to dodge this straightforward application of the mootness exception by ignoring its normal operation and trying to create an endless loop of mootness and unripeness, effectively eliminating the exception to the mootness doctrine and denying the League its day in court. Defendants' strategy is to argue that such claims are never appropriate for preliminary injunction and resist expedition. Then they launch the endless loop by arguing that (1) the case is moot the moment the prohibition period ends or the legislative vote has passed and (2) any plans for materially-similar future ads in similar circumstances are never ripe for adjudication.

In the first step of the loop of this case, the FEC admits that unless judicial review is "highly expedited," the question of a preliminary injunction in a challenge to the electioneering communication prohibition will become moot before it can be fully litigated. *See FEC Opposition to Appellant's Motion to Expedite and Consolidate Briefing* (Filed May 15, 2006) at 5. Yet it argues against expedition on the basis that more suitable relief is available, i.e., a hearing "before the district court, perhaps following further factual development or proceedings."

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[7]Claims regarding pregnancies and elections both tend to evade review because the normal period of pregnancy, elections, and legislative votes "is so short that [they] will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy [and election-related] litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Roe*, 410 U.S. at 125. Moreover, as shown in text, Defendants are overtly attempting to evade review by opposing expedition, attempting to preclude preliminary injunctions, and arguing their endless loop of mootness and unripeness.

Id.[8] But elsewhere Defendants have argued, and the lower court has suggested, that once the time for running a specific grass-roots lobbying ad is past, the question of the constitutionality of the electioneering communications prohibition with respect to that particular ad is moot, and, further, that the question of its application is not ripe with respect to any future ads.

On June 23, 2006, the district court ordered Plaintiff to "show cause . . . why the 'Crossroads' portion of this case should not be dismissed as moot" and Defendants to address "the mootness of the 'Crossroads' portion of the case." *CCL v. FEC*, Civil Action No. 06-0614 (Docket # 41). In response, (Docket # 46) the FEC argued that because "CCL no longer has any plans to run the 'Crossroads' advertisement it allegedly intended to air from May 10 through early June 2006" and "currently has no specific plans to run any grassroots lobbying advertisements between now and election day," "the issue whether it was constitutional to apply the electioneering communication provision to the Crossroads advertisement . . . is no longer an actual, ongoing controversy." *FEC Mem. Responding to June 23 Order* at 2 (*CCL v. FEC*, Civil Action No. 06-0614 (Docket # 46)). Completing the loop, on June 12 Defendants moved for dismissal of the League's claims "regarding broad classes of future, hypothetical 'grass-roots lobbying,' specifically all communications beyond the 'Cross-roads' advertisement . . . . [because s]uch claims are not ripe, and are too speculative and hypothetical to be justiciable under Article III." *FEC Motion to Dismiss Plaintiff's Claims* at 1 (*CCL v. FEC*, Civil Action No. 06-0614 (Docket # 37)).

Taken together, these positions mean that when the League learns that Congress has scheduled a vote on an issue of interest

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[8]The "further factual development" the FEC envisions, in addition to the discovery it has already conducted, is in fact, extensive and intrusive and is not limited to factual issues. *Id.* at 9-10.

during a prohibition period, the League must either plan to violate the law or seek preliminary injunctive relief. When preliminary relief is inevitably denied, the League's claim is considered moot. It cannot invoke the exception for matters capable of repetition yet evading review (in order to protects its rights for the next time it runs ads) be ause the same ad won't be run again and its plans to run future ads are not deemed ripe. So it is ever waiting for the proper time for review of its claim, but never qualifying for it. This endless loop is cobbled from misconstructions of the ripeness doctrine[9] and the "capable of

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[9]As to ripeness, in a pre-enforcement challenge to a law threatening prosecution for First Amendment activities, an injured party has standing and the action is ripe for adjudication if there is a credible threat of enforcement. *Navegar Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("[S]uch threats of enforcement can simultaneously ripen a preenforcement challenge and give the threatened party standing." (citing *Babbitt*, 442 U.S. at 298-99; *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3532.5 (1984). *See also California Pro-Life Council, Inc. v. Getman*, 328 F.3d at 1093-94 (where intended communication was arguably subject to California reporting and disclosure requirements, it was a cognizable injury establishing standing, and because the organization suffered an injury as a result of an allegedly unconstitutional statute its claim was ripe); *Arizona Right to Life PAC v. Bayless*, 320 F.3d1003, 1007 n. 6 (9th Cir. 2003) (noting in a similar context that finding that the plaintiff has suffered a harm "dispenses with any ripeness concerns"). In a preenforcement challenge of a law that arguably violates the First Amendment, unless the threat of enforcement is not credible, the plaintiff has standing and the controversy is ripe.

The electioneering communication prohibition is plainly applicable to the Crossroads ad and any similar "targeted" broadcast ad aired during the prohibition periods. Moreover, as was pointed out in *Chamber of Commerce v. FEC*, enforcement of FECA provisions can be initiated by private party complaint and FEC refusal to enforce may be challenged by a private party. 69 F.3d 600, 603 (D.C. Cir. 1995); 2 U.S.C. § 437g(a)(8). "Therefore, even without a[n FEC] enforcement decision, [the League is] subject to litigation challenging the legality of [its] actions . . . ." *Id.* Contrary to the FEC view, claims such as the League's are almost *always* ripe.

repetition yet evading review" exception to the mootness doctrine.

But as noted before, the League's plan to run materially-similar ads in the future is not the basis of the present constitutional challenge. The Crossroads ad is the basis of the present challenge. The challenge is not moot because of the exception to the mootness doctrine for matters capable of repetition yet evading review. The League's desire to do materially-similar future ads, coupled with its wide range of interests and the regular recurrence of elections, demonstrates a reasonable likelihood that this situation will arise again. So this case is not moot, and ripeness is not even at issue.

Conclusion

The motions to dismiss or affirm should be denied. Probable jurisdiction should be noted and briefing ordered as requested in the Jurisdictional Statement.

Respectfully submitted,

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